United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

309

BRIEF FOR THE UNION

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1137

RETAIL STORE EMPLOYEES UNION LOCAL NO. 400, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*,

and

C.W.F. CORPORATION, *Intervenor*.

On Petition To Review an Order of the National Labor Relations Board

---

IRA M. LECHNER
3244 Prospect Street, N.W.
Washington, D.C. 20007
Of Counsel

W. DEAN WAGNER
1925 North Lynn Street
Arlington, Virginia 22207
Attorney for Petitioner

July 1971

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

9

INDEX

TABLE OF CASES

* Cases chiefly relied upon are marked by asterisk.

* Cases chiefly relied upon are marked by asterisk.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1137

RETAIL STORE EMPLOYEES UNION LOCAL No. 400, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*,

and

C.W.F. CORPORATION, *Intervenor*.

On Petition To Review an Order of the National Labor Relations Board

---

BRIEF FOR THE UNION

STATEMENT OF ISSUES PRESENTED

The Trial Examiner, affirmed by the Labor Board, concluded that the unfair labor practices committed by the employer were "flagrant", but the Labor Board declined

to broaden its traditional remedies. The questions presented are:

1. In a case in which the employer's unfair labor practices are "flagrant" and premeditated, can they be adequately remedied by a Board order requiring that the remedial notice remain posted on the employer's premises for only sixty days, or should the Board order that the notice remain posted for six months?

2. Where unfair labor practices are "flagrant" and were perpetuated on a great number of employees, in order to adequately remedy the violations should not each employee receive a personal copy of the remedial notice?

3. When an employer, by use of "flagrant" unfair labor practices, defeats a Union's organizing campaign, should not the Labor Board order the employer to make its premises available for a meeting of all the employees who were affected by the unfair labor practices so that the Union may present fairly its case for organization?

This Court has jurisdiction of this Petition To Review pursuant to Section 10(f) of the National Labor Relations Act, as amended (49 Stat. 449 (1935); as amended, 61 Stat. 136 (1947), 73 Stat. 319 (1959); 29 U.S.C. § 151 *et seq.*).[1]

This case has not previously been before this court.

REFERENCES TO RULINGS

The Trial Examiner's Decision, issued on October 22, 1970, is reproduced in full in the Joint Appendix at page 312.[2]

---

[1] Hereafter referred to as the "Act".

[2] The Joint Appendix will hereafter be referred to as "J.A.". References preceding a semicolon are to the Board and Trial Examiner Decisions; those following are to the record pleadings, testimony or exhibits.

STATEMENT OF THE CASE

Petitioner, Retail Store Employees Union Local No. 400, Retail Clerks International Association, AFL-CIO (hereafter called the "Union" or "Petitioner") seeks review of the failure of the National Labor Relations Board (hereafter the "Board" or "NLRB") to provide a meaningful, effective remedy for the deliberate and flagrant unfair labor practices committed by C.W.F. Corporation (hereafter the "Company" or the "employer" or "C.W.F."). Briefly, the Board found that the Company committed three violations of the Act:1) "by coercively interrogating employees concerning their attitude toward the Union and their signing of union authorization cards and by threatening employees with discharge for having signed such cards" (J.A. 338, 361); and 2) "by soliciting employees to revoke or withdraw their union authorization cards and by assisting employees in doing so" (J.A. 339, 361); and 3) "by discharging David Stevenson because of his adherence to, and his activity in support of, the Union, thereby discouraging membership in the Union" (J.A. 339, 361). By engaging in the unfair labor practices recited above, the Company violated Sections 8(a)(1) of the Act and by discharging David Stevenson, the Company violated Sections 8(a)(3) and (1) of the Act (J.A. 338-339).

The Trial Examiner, affirmed by the Board, found that the unfair labor practices "were flagrant" (J.A. 338, 359-361). Nonetheless, as a remedy, the Trial Examiner, again affirmed by the Board, merely ordered the Company to "cease and desist" from its unlawful conduct, that it offer to David Stevenson reinstatement to his former job with back pay, and that it post a notice of its violations at all its stores for a period of 60 days (J.A. 339-342, 361). The Union submits that the Board's remedy is plainly inadequate and that the employer should be ordered to post its remedial notice for 6 months, not 60 days, that

each employee be mailed a personal copy of the remedial notice, and that the company make its premises available to the Union for a meeting at which time the Union may present its case for organization. The facts of this case point up the need for remedies that go beyond a merely traditional, and accustomed, approach.

I. Stevenson Signs Up Employees at Bailey's Crossroads: the Union Conducts a Blitz Campaign and Stevenson Is Fired

On March 18, 1970, union activity began at C.W.F. Corporation's Bailey's Crossroads store when David Stevenson, an employee with a fine record who had been rehired on two previous occasions by the Company and whose sales performance was admittedly superior (J.A. 321; 219-221), distributed authorization cards to the employees, including Assistant Manager Turkow (J.A. 319; 17-18). Top Company officials knew about Stevenson's effort. Charles Casper, the Company's store manager at the Bailey's Crossroads store, admitted that he learned about Stevenson's role in the card signing prior to his discharge (J.A. 319; 226). And Morris Kottler, also known as Moe Kay, who was the employer's general manager, admitted that cards had been passed out in all the stores and that he had learned this prior to the morning of March 21, 1970 (J.A. 320; 251, 271). Since Stevenson had signed up the Bailey's Crossroads employees, Kay must have known about his effort. And the uncontradicted testimony of Stevenson demonstrates that Assistant Manager Turkow, whom Stevenson had signed up, was a supervisor (J.A. 317; 18, 46-47, 188). There is no dispute in the record that the solicitation was made in the open and there is uncontradicted testimony that Store Manager Casper was in the store at the time (J.A. 319; 75-76).

Two days later, on March 20, 1970, the Union's organizers signed up employees at several of the Company's stores in a "blitz" campaign (J.A. 319; 62).

The next day, March 21, at about 11:30 a.m., before David Stevenson had arrived at work, General Manager Moe Kay had a conversation with Gerald R. Eudailey, another employee (J.A. 320; 69). Kay asked what Eudailey thought of the Union and then said, "You know Stevenson's going to get fired today, don't you?" (J.A. 320-321; 69).

The menacing implication of that conversation was fulfilled when Stevenson arrived later in the morning. Moe Kay took Stevenson and Casper to the back of the store ostensibly to discuss an incident involving a dishonored check (J.A. 323; 48, 26). Stevenson and Kay engaged in an argument and Kay immediately discharged him (J.A. 324; 18-19, 246-248).

II. Stevenson Solicits Employees at the Tyson's Corner Store; They Are Threatened With Discharge

After Stevenson's discharge, he went to the C.W.F. store at Tyson's Corner where he circulated among the employees and asked them to sign cards authorizing the Union to represent them (J.A. 324-325; 19). When one of the employees informed Store Manager Nathan Vogin of what Stevenson was doing, Vogin called out loudly, "Anyone who signs one of those cards is fired" (J.A. 325; 145). Vogin then went out and accosted Stevenson, claiming that all the employees wanted their cards back (J.A. 325; 182).

Vogin went back into the store and told employee Martin Flynn that he was "stupid" to have signed the card and asked him to get his and other employees' cards back from Stevenson (J.A. 325; 145-153). On or about that same day, Vogin told other employees that "they weren't going to have their jobs . . . very long if they signed that Union card" (J.A. 325; 184).

III. The Company Managers Meet With Moe Kay: Employees Are Threatened and Urged To Withdraw From the Union, and All Do So

On Tuesday, March 24, 1970, Moe Kay, who had previously received legal advice on the rights of employers in organizing campaigns, assembled all the store managers and the controller (J.A. 208, 262). At that meeting, among other things, the managers were told how to assist employees in withdrawing from the Union and that employees who signed up with unions were liable to be fined for crossing picket lines and to be assessed in the event their co-unionists at another store went on strike (J.A. 262-266).

The next day virtually all of the employees sent letters to the Union asking that their authorization cards be rescinded and that the cards be returned (J.A. 326-329; 289-306). Although there were minor differences at each store, the pattern of conduct at each store was the same. At each store, conversations between the employees and the manager or assistant manager were initiated by the manager (J.A. 326-329; 129, 135, 158, 169, 178). The employees were told how to withdraw from the Union and what to say in letters which they subsequently wrote (J.A. 326; 139, 150, 179). They were supplied with stationery (J.A. 326-329; 139, 148, 159). They made carbon copies of the letters which they had written upon the instructions of the managers and assistant managers (J.A. 326-329; 130, 140, 149). And, they gave the letters to Company officials who mailed them, supplied the postage, and supplied or affixed the certified mail stickers which appear on the envelopes (J.A. 326-328; 131-132, 262, 237-238). Although Kay denied that he had instructed his managers to obtain carbon copies of the letters and supposedly first learned about them at the hearing (J.A. 260-261), in other respects the method of withdrawal followed by the employees was precisely the one Kay outlined at the meeting with his managers—even down to the "courtesy" extended to the Union of having the withdrawal letters sent by certified mail (J.A. 265).

IV. The Trial Examiner, Affirmed by the Board, Finds That the Violations "Were Flagrant", But Refuses To Order Any Remedies Other Than the Traditional Ones

The Trial Examiner found that the Company engaged in unfair labor practices within the meaning of Sections 8(a)(1) and (3) of the Act (J.A. 329-337). He ordered the traditional remedies discussed, *supra,* at p. 3. The Union urged the Trial Examiner to go beyond the normal remedies and to order the company to post the remedial notice for 6 months, to mail a personal copy of the remedial notice to each employee, and to make its premises available to the Union for organizational purposes (J.A. 336).

The Trial Examiner flatly rejected the Union's proposals. The Trial Examiner acknowledged that the Company's unfair labor activity and practices "were flagrant" (J.A. 338) but he concluded that "they can be adequately remedied, in my opinion, by an order . . . containing broad cease-and-desist provisions and a requirement that respondent post notices in all the stores it operates under the trade name of Sun Radio. In view of this, there is no need to depart from the Board's normal remedial policies in the extreme manner suggested by the Union" (J.A. 338). The Board affirmed the Trial Examiner's findings and adopted, in relevant part, as its Order the recommended Order of the Trial Examiner (J.A. 359-361).

SUMMARY OF ARGUMENT

Petitioner contends that the Board erred in not going beyond its traditional approach to the "remedy" in this case. The Board found that the Company's unfair labor practices "were flagrant". It is apparent that they were. But, the Board's remedy amounts no more than posting a legal notice for 60 days. The notice takes its place with other legal notices and, in fact, is largely ignored.

Since the violations were "flagrant", why shouldn't they be remedied in some fashion other than the garden variety unfair labor practice? It is clear that the Union will have

difficulty in getting across its message to the employees. Thus, each employee should receive a personal copy of the remedial notice, the notice should be posted for much more than 60 days, and in order to purge the effects of the "flagrant" violations, the Company should be ordered to make its premises available to the Union for a meeting of the employees so that the Union could make its message clear.

ARGUMENT

In a Case Where the Employer's Unfair Labor Practices Are Found To Be "Flagrant", the National Labor Relations Board Erred When It Failed To Order a Compensatory Remedy

Section 10(c) of the Act empowers the Labor Board, upon a finding that an unfair labor practice has been committed, to order the guilty party to "cease and desist from such unfair labor practice, and to take *such affirmative action* including reinstatement of employees, with or without back pay, *as will effectuate* the policies of the Act" (emphasis added).

The Supreme Court has stated that this clause of the Act is a "broad command." *N.L.R.B.* v. *J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 90 S.Ct. 417, 24 L.Ed. 2d 405 (1969).

The remedy fashioned by the Board should be so designed as to undo the effect of the employer's unlawful labor practices. The affirmative action ordered by the Board should be such as would restore the employees and the Union to the position which they would have enjoyed had the violations not occurred. And the remedy should be designed to prevent future violations by this employer.

The Board cannot quarrel with these principles; the test is to see if the Board satisfied them in this case.

Here, it is clear that unless the effects of the unfair labor practices are completely purged, the Union will experience

great difficulty in adequately communicating with these employees. The violations were not only "flagrant", but they were successful as well. Traditionally, the Board has ordered that the remedial notice simply be posted for a 60-day period. Whether or not the Board orders unusual remedial action apparently depends in large part on whether the unfair practices found are "aggravated". See, *Tasty Box Lunch Company, Inc.*, 175 NLRB No. 7 (1969); *William L. Bonnell Co.*, 170 NLRB No. 14 (1968); *Gotham Industries, Inc.*, 167 NLRB 670 (1967).

In adddition, the Board has, on occasion, ordered an employer to mail a copy of the Board's remedial notice to each employee, particularly where the employer's unfair labor practices were serious and without any excuse. See, e.g., *Vernon Calhoun Packing Company, Inc.*, 173 NLRB No. 112 (1968); *International Union of Operating Engineers, Local No. 825*, 173 NLRB No. 145 (1968), enf'd 420 F.2d 961 (3rd Cir. 1970). And, such a remedy has been upheld by this Court in *International Union of Electrical Workers* v. *N.L.R.B.*, 127 U.S. App. D.C. 303, 383 F. 2d 230, 232 (1967), cert. denied 390 U.S. 904 (1968). See also, *N.L.R.B.* v. *H. W. Elson Bottling Company*, 379 F. 2d 223 (6th Cir. 1967); *Textile Workers Union of America* v. *N.L.R.B.*, 388 F. 2d 896 (2nd Cir. 1967).

Similarly, granting the Union access to the Company's parking lots in order to distribute literature has been upheld in *Decaturville Sportswear Company, Inc.* v. *N.L.R.B.*, 406 F. 2d 886 (6th Cir. 1969). There, the Court stated (406 F. 2d at 889:

> Since many of the Company's unfair practices were directed toward thwarting the Union's efforts to distribute literature to employees as they left work, granting access to parking lots under reasonable restrictions is directly related to the Company's unlawful activity. This provision merely removes the disadvantages caused to the Union by reason of the Company's violations.

And, granting the Union access to the Company's premises for a meeting with the employees in the advent that the Company addresses its employees on the question of representation has been approved. *Montgomery Ward* v. *N.L.R.B.*, 339 F. 2d 889 (6th Cir. 1965); *N.L.R.B.* v. *H. W. Elson Bottling Company, supra.*

In *International Union of Electrical Workers* v. *N.L.R.B.*, 127 U.S. App. D.C. 303, 305, 383 F. 2d 230, 232 fn. 4 (1967), cert. denied 390 U.S. 904 (1968), this Court upheld a Board order requiring the employer to give access for one hour on company time and expense to the Union to present its position. Again, the premise of the Board's grant of such a remedy, and this Court's approval of it, was that circumstances surrounding the commission of the unfair labor practices were "aggravated".

Thus, the question squarely presents itself: since the Board found that the unfair labor practices committed in this case were "flagrant", why weren't the more unusual remedies ordered? Merely stating, as the Trial Examiner did, that the violations may be adequately remedied by the usual order is simply not enough; more explication is necessary, at the least, but in fact the Board's order simply cannot be justified.

In practice, the Board's notice posting requirements are plainly inadequate. Posting a notice is as effective as placing a legal notice in the classified sections of a newspaper. The employees do not "see" a posted notice in the sense that it comes clear to them that the company has been found wrong and won't do it again. The notice is tacked up along with similar legal notices from the workmen's compensation system, the EEOC, State and local governments, etc. In simple truth, the legal notice is largely a joke— at the expense of the employees and the Union.

Petitioner respectfully submits that in this case the Board fashioned an inadequate remedy. If the violations, as the Board has held in this very case, "were flagrant", some-

thing more is required of the Board than merely the ordering of the same remedy that it grants in the garden variety unfair labor practice case.

In *International Union of Electrical Workers* v. *N.L.R.B. (Tiidee Products)*, 138 U.S. App. D.C. 249, 426 F.2d 1243 (1970), cert. denied 400 U.S. 950, 91 S.Ct. 239, 27 L.Ed.2d 256 (1970), this Court addressed itself with respect to the arguments of the Board as to its discretionary powers, tradition, and silence on the part of the Board in explicating its choice of remedies. The language of the Court in that case is singularly applicable here (138 U.S.App.D.C. 249, at 256):

> There is a presumption that favors the Board, with its expertise, in its selection of remedies. Fibreboard Paper Prods. Corp. v. N.L.R.B., *supra*. *See also* Consolo v. FMC, 383 U.S. 607, 86 S.Ct. 1018, 16 L.Ed.2d 131 (1966). That presumption is given full effect when the Board makes a conscious selection of remedies to effectuate the Act, provided reasons for its conclusion are stated or may fairly be discerned. That is not the situation in the case before us. The Board's silence on a substantial question raised by the Union is not sanctified by the circumstances that it was being passive rather than affirmative.
>
> That indeed seems to be the misguided assumption of the Board—that it is not subject to disapprobation if it is only doing the same as it has done before. The Examiner declined to award further relief to the Union on the ground that no such step had yet been authorized by the Board. Whatever merit in administrative terms may attach to this course at the Examiner level can hardly be adduced as justification for the Board's announcement in its decision that it was continuing the order drafted by the Examiner for the reasons stated by him. This kind of circularity hardly sustains an agency's disposition of a serious question . . . .
>
> The Board's assumption seems to be that application of a uniform remedy stills all legal doubts. But it is

> as old in philosophy at least as Aristotle, and it is settled in the law as well, that the application of an apparently uniform rule may in reality engender unfair discrimination when like measures are applied to unlike cases.

And compare *United Steelworkers of America (Quality Rubber)* v. *N.L.R.B.*, — U.S.App.D.C. —, 430 F.2d 519, 522 (1970). The instant case, unlike in *Steelworkers*, presents no "debatable question" with respect to the employer's conduct. And, like in *Tiidee Products*, here the position of the company is "palpably without merit"; its violations "were flagrant".

Remedies are called for "to effectuate the policies of the Act".

CONCLUSION

The present case is a clear example of the Board's failure to follow the mandate of Section 10(c) of the Act. The Board here simply failed to fashion a remedy to fit the circumstances of this case. It found that the Company's violations were "flagrant". But, it applied the same traditional remedy that it applies to other non-flagrant violations. It failed to explicate its reasons for denying greater relief to the Union, contenting itself with a statement that the violations can be remedied by the usual broad cease-and-desist order. But, no reasons were offered as to why if these violations were "flagrant" they didn't call for a more stringent remedy. In fact, the sixty day notice fails to purge the violations from the minds of the employees. We respectfully submit that in such cases—"flagrant" violations—a personal copy of the order should be mailed to each employee, the remedial notice should be posted for six months, not sixty days, and the employer should be ordered to make his premises available for a one-hour meeting of the

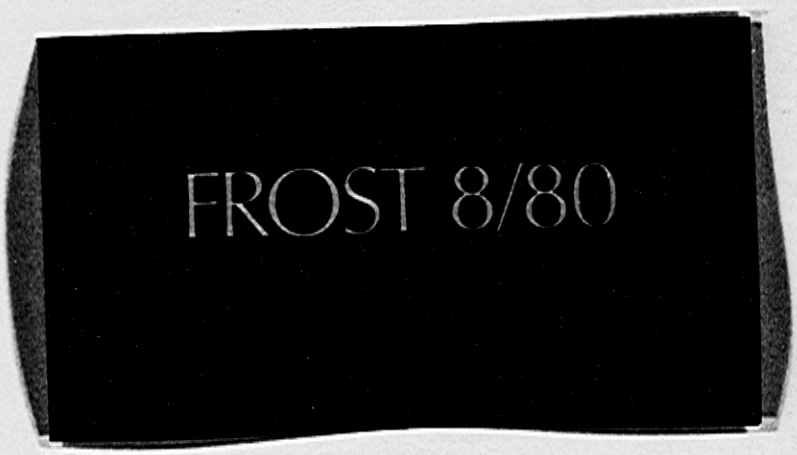
employees on company time and at company expense in order that the Union might present its case for organization.

Respectfully submitted,

IRA M. LECHNER
3244 Prospect Street, N.W.
Washington, D.C. 20007
Of Counsel

W. DEAN WAGNER
1925 North Lynn Street
Arlington, Virginia 22207
Attorney for Petitioner

July 1971



Nos. 71-1137 and 71-1255

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1137

RETAIL STORE EMPLOYEES UNION LOCAL 400,
RETAIL CLERKS INTERNATIONAL ASSOCIATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

C. W. F. CORPORATION,
Intervenor.

No. 71-1255

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

C. W. F. CORPORATION,
Respondent.

On Petition to Review and On Application for Enforcement
of an Order of the National Labor Relations Board

BRIEF FOR C. W. F. CORPORATION

ARENT, FOX, KINTNER, PLOTKIN & KAHN

Allen G. Siegel
Richard B. Slosberg

800 Federal Bar Building
1815 "H" Street, N. W.
Washington, D. C. 20006

Attorneys for C. W. F. Corporation

INDEX

AUTHORITIES CITED

---

*Authorities chiefly relied upon.

Cases: Page

---

* Authorities chiefly relied upon.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1137

RETAIL STORE EMPLOYEES UNION LOCAL 400,
RETAIL CLERKS INTERNATIONAL ASSOCIATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

C.W.F. CORPORATION,
Intervenor.

No. 71-1255

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

C.W.F. CORPORATION,
Respondent.

On Petition to Review and On Application for Enforcement
of an Order of the National Labor Relations Board

BRIEF FOR C.W.F. CORPORATION

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1137

RETAIL STORE EMPLOYEES UNION LOCAL 400,
RETAIL CLERKS INTERNATIONAL ASSOCIATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

C.W.F. CORPORATION,
Intervenor.

No. 71-1255

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

C.W.F. CORPORATION,
Respondent.

On Petition to Review and On Application for Enforcement
of an Order of the National Labor Relations Board

BRIEF FOR C.W.F. CORPORATION

STATEMENT OF THE ISSUES PRESENTED

Case No. 71-1255

A. Whether the Trial Examiner of the National Labor Relations Board wrongfully and prejudicailly refused to grant a continuance of the hearing, and thereby denied C.W.F. Corporation an adequate opportunity to prepare a defense to the allegations contained in amendments to the complaint made at the hearing.

B. Whether substantial evidence on the record as a whole supports the finding of the National Labor Relations Board that C.W.F. Corporation violated Section 8(a)(3) and (1) of the National Labor Relations Act by discharging employee David S. Stevenson.

C. Whether C.W.F. Corporation violated Section 8(a)(1) of the Act by rendering minor and ministerial assistance to employees who wished to withdraw authorization cards from the Union.

Case No. 71-1137

Whether the National Labor Relations Board properly declined to order the additional remedial relief sought by Retail

Store Employees Union, Local 400, Retail Clerks International Association.

NO PRIOR PROCEEDINGS IN THIS COURT

In accordance with Rule 8(d) of the General Rules of this Court, C.W.F. Corporation states that this case is before the Court for the first time.

REFERENCES TO PARTIES AND RULINGS

Case No. 71-1137 is before this Court upon a petition of Retail Store Employees Union, Local 400, Retail Clerks International Association, hereinafter referred to as "the Union", filed pursuant to Section 10(f) of the National Labor Relations Act, as amended, hereinafter referred to as "the Act", (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, et seq.) to review an order of the National Labor Relations Board, hereinafter referred to as "the Board", issued February 17, 1971 and reported at 188 NLRB No. 94 (J.A. 312-345, 359-361).[1/] Case No. 71-1255 is before

1/ "J.A." references are to the portions of the record printed in the Joint Appendix.

this Court upon application of the Board filed pursuant to Section 10(c) of the Act to enforce the same order issued against C.W.F. Corporation, hereinafter referred to as "the Company". On April 16, 1971, the Court granted the Board's motion to consolidate cases Nos. 71-1137 and 71-1255, and on April 22, 1971, the Court granted the Company's motion to intervene in Case No. 71-1255. This Court has jurisdiction under Section 10(e) and Section 10(f) of the Act, and no jurisdictional issue is presented.

STATEMENT OF THE CASE

I. PRELIMINARY STATEMENT

Pursuant to a charge filed by the Union on March 30, 1970, the Regional Director for the Fifth Region of the Board issued a Complaint and Notice of Hearing in this case on June 5, 1970 alleging, inter alia, that the Company had violated Section 8(a)(3) and (1) of the Act, by interrogating employees concerning their Union activities and by discriminatorily discharging employee David S. Stevenson. On June 15, 1970 the Company filed its answer, denying the commission of any unfair labor practices. On July 13, 1970, two days before the

hearing was scheduled to begin, Counsel for the General Counsel of the Board informed the Company's counsel that he intended to amend the complaint at the hearing to include two additional allegations of violations of Section 8(a)(1) of the Act (J.A. 307). These new allegations involved different persons, different dates and different circumstances than the allegations of the original complaint. On the same date that he was informed of the intended amendments, the Company's counsel requested that the Regional Director postpone the hearing for ten (10) days to permit him to investigate the new allegations and to prepare adequately the Company's defense to them. The Regional Director denied the Company's request on the following day. On July 15, 1970 the hearing was begun before Trial Examiner Alvin Lieberman at Washington, D.C. Counsel for the General Counsel moved to amend the complaint to include the additional allegations, and the motion was granted over the objection of counsel for the Company (J.A. 6-9). At this point, counsel for the Company requested a continuance of ten (10) days to prepare the Company's defense to the additional allegations, and the Trial Examiner denied his motion (J.A. 9). The hearing then proceeded,

and Counsel for the General Counsel presented evidence on all allegations in the complaint except those included by his motion to amend. At the end of the hearing day on July 15, 1970, counsel for the Company again requested a continuance of the hearing in order to prepare the Company's defense to the new allegations. On this occasion he requested only four (4) days, until the following Monday. This request was also denied by the Trial Examiner (J.A. 96). The hearing reconvened on July 16, 1970 at which time evidence was taken with respect to the new allegations. At the end of the day the hearing was recessed until Monday, July 20, 1970 when it was reconvened. The hearing was finally closed at the end of the day on July 20, 1970. On October 22, 1970, Trial Examiner Lieberman . issued his Trial Examiner's Decision in which he concluded that the Company violated Sections 8(a)(1) and (3) of the Act by interrogating employees, by soliciting employees to withdraw their Union authorization cards and by discharging employee David S. Stevenson (J.A. 312-345).

On December 10, 1970 the Company filed exceptions to the Trial Examiner's Decision and to certain rulings made by the Trial Examiner at the hearing (J.A. 347-358), and on February 17, 1971, the Board issued its Decision and Order affirming the Trial Examiner and adopting his findings, conclusions and recommendations (J.A. 359-361). In its Decision and Order, the Board did not order the additional remedial action which the Union requested.

II. STATEMENT OF THE FACTS

A. The Company's Operations

The Company is a Virginia corporation, engaged in the retail sale of radios, television sets, and electrical appliances at stores in Maryland and Virginia. The Company does business under the trade name of "Sun Radio" stores and also operates a franchise operation in certain "G.E.M." stores (J.A. 11). There is a collective bargaining agreement in force between the Company and the Union, covering its G.E.M. franchise operation. There is no collective bargaining agreement in force at the Sun Radio stores (J.A. 195-196).

B. Discharge of David S. Stevenson

In February, 1970, David S. Stevenson, a former employee, was rehired as a part-time salesman by Charles W. Casper, manager of the Sun Radio store at Bailey's Crossroads, Virginia. It was Casper's understanding, which he communicated to the Company's General Manager, Morris Kottler (Moe Kay), that Stevenson was being hired on a temporary basis for a period extending only a few weeks past the store's Washington's Birthday sale (J.A. 217-219). Stevenson was compensated on a straight commission basis (J.A. 13). In the case of part-time salesmen, there is no "draw" against commissions (J.A. 243-244), and therefore, the only compensation Stevenson received was a percentage of the money collected by him for the sale of merchandise.

The Company, for several years preceding the events herein, has had a policy with respect to accepting checks in payment for merchandise (J.A. 308-312). As recently as February 10, 1970 the Company's Comptroller directed store managers to readvise all sales personnel of this policy (J.A. 311-312).

On February 25, 1970, Stevenson accepted a check from Robert J. Saunders in payment for a television set (J.A. 13). The identification supplied by the purchaser was not sufficient to meet the standards established by the Company for accepting checks. Casper approved the check only because of the representations made to him by Stevenson concerning Saunders (J.A. 210-211), and he told the Vice President of C.W.F., Joseph M. Warsaw, that such was the only reason he had approved the check (J.A. 210-211). On the basis of these facts, Warsaw told Casper that Stevenson would have to pay for the television set (J.A. 214-215). Stevenson refused to do so (J.A. 215).

On Saturday, March 21, 1970, the Company's General Manager, Morris Kottler, met with Stevenson and Casper in order to resolve this issue and determine responsibility for the bad check. It is the testimony of both Casper and Kottler that at this meeting Stevenson called Casper a liar, used vulgar language, and otherwise conducted himself in an offensive manner (J.A. 216-217, 247-248). Because of this conduct Kottler discharged Stevenson (J.A. 248).

Gerald Eudailey, a salesman at the Bailey's Crossroads store, testified on direct examination by the Counsel for the General Counsel that a few minutes prior to the meeting with Stevenson, Kottler asked Eudailey what he thought of the Union and also indicated that Stevenson was to be fired that day (J.A. 69). On cross-examination by Counsel for the General Counsel, Kottler consistently denied having had such a conversation with Eudailey (J.A. 252).

C. The Union's Organizing Efforts and the Employees' Response

After he had been informed by Casper that he would have to make the Saunders' check good, Stevenson went to the Union and obtained authorization cards and other organizing materials (J.A. 34-35). Stevenson brought these materials to work on Wednesday evening, March 18, 1970 and solicited signatures for authorization cards from his fellow workers (J.A. 17-18). Store Manager Casper, was not present when this activity took place (J.A. 40-41). Albert J. Chavaree, the organizing director of the Union, dispatched ten (10) organizers on Friday, March 20, 1970, to distribute Union authorization cards in all Sun Radio stores (J.A. 62). There is no evidence

that anyone other than Stevenson, on March 18, distributed cards in the Bailey's Crossroads store.

Following his discharge at Bailey's Crossroads on March 21, 1970, Stevenson went to another Sun Radio store at Tysons Corner, Virginia to solicit signatures for Union authorization cards (J.A. 113). According to Stevenson, he tried to conceal his activity from the Store Manager, Nathan Vogin (J.A. 114), but Vogin discovered what was going on. Stevenson then testified that while he was in a phone booth outside the store he was able to hear Vogin in a very loud voice, inside the store, during business hours, say "Anyone who signs one of those cards is fired" (J.A. 115). The only corroborating evidence which supports this testimony is the testimony on direct examination of Martin Flynn who testified that while he was in the back of the store he heard Vogin in the front of the store say that anyone who signed a card would be fired (J.A. 146).

The following Monday, March 23, 1970, the Company's General Manager, Kottler, consulted legal counsel concerning the organizing activity of the Union and met with the various store managers the following day to brief them concerning this activity.

Kottler told his managers they were not, under any circumstances, to interrogate employees concerning their interest in a union but they could answer employees' questions to the best of their knowledge, including telling them where to write requesting the return of their union cards, if they were so asked by employees (J.A. 262-266).

Later in the week a total of eighteen (18) employees from three (3) different Sun Radio stores wrote to the Union requesting the return of the cards they had signed (J.A. 289-306). Six (6) of these employees testified concerning the circumstances surrounding the writing of these letters. Their testimony is summarized as follows.

June Clark

Mrs. Clark is a cashier at the Sun Radio store at Tyson's Corner. Her manager is Nathan Vogin. She had signed a Union card and had given it to Stevenson (J.A. 127-129). On March 25, 1970, Mrs. Clark wrote to the Union requesting the return of her card (J.A. 302). She put her home address on the letter, stamped and certified the letter herself (J.A. 131). In her letter, Mrs. Clark expressed her intention to give the matter of joining the Union "more

thoughtful consideration" and stated that she would "decide whether I wish to join the Union at a future date," (J.A. 302). Vogin supplied the address of the Union to Mrs. Clark (J.A. 132). Mrs. Clark did not testify to any other assistance given to her by Vogin. She does not know who mailed the letter for her (J.A. 130-131), but she personally received the returned certified receipt (J.A. 136).

Martin D. Flynn

Martin D. Flynn was employed as a stock boy at the Tyson's Corner Sun Radio store during the organizing campaign and for a short time thereafter. On March 21, 1970, Flynn had signed a Union card given him by Stevenson and that same day had asked Stevenson to return it and the cards of other employees. Stevenson told him that if he wanted his card back he could write to the Union. Stevenson, according to Flynn, also told him the address of the Union where he could write to get the card back (J.A. 154-155). Flynn returned to the store, told the other employees what Stevenson had said, and told the same to his manager, Vogin (J.A. 156-157). Although Flynn testified that upon his telling Vogin what Stevenson said, Vogin asked him to write such a letter (J.A. 156-157), and that he wrote the letter

on the same day (J.A. 150). The letter (J.A. 304) is dated the following Wednesday, March 25, 1970. Vogin gave Flynn some stationery with which to write a letter (J.A. 148) and although Flynn gave the letter to Vogin (J.A. 149), he did not know who mailed it (J.A. 151). Flynn was fired about a week after this episode for reasons not connected with this case (J.A. 155).

Robert L. Shaw

Robert L. Shaw is a non-commissioned officer in the U. S. Air Force. In March, 1970, he was employed as a part-time salesman at the Tyson's Corner Sun Radio store, and during the Union organizing campaign he signed a Union card (J.A. 157-158). Several days after he signed the card, he had a conversation with Vogin, during which his own thoughts concerning the impropriety of a member of the Armed Forces belonging to a Union were reinforced (J.A. 158-159). After this conversation, he wrote a letter to the Union, dated Thursday, March 26, 1970, requesting the return of his card (J.A. 305). Shaw obtained the stationery for the letter from the store office and Vogin supplied him with the

address (J.A. 159-160), but the words of the letter were Shaw's. Nobody dictated the letter to him (J.A. 165).

John Ruby

John Ruby was also employed as a salesman at the Tyson's Corner Sun Radio store and signed a card for the Union during their organizing campaign in March, 1970 (J.A. 177). Sometime thereafter, in a conversation with Vogin, Ruby learned that another employee, Tink Seymour, had written a letter to the Union requesting his card back (J.A. 179). Using Seymour's letter as a pattern (J.A. 181), Ruby wrote a letter himself, on stationery provided by Vogin, requesting his Union card back (J.A. 303). Although he did not provide any postage for his letter, Ruby did receive the certified receipt back (J.A. 180-181).

Ira Bleetstein

During the Union organizing campaign, Ira Bleetstein was a salesman at the Sun Radio store in Marlow Heights, Maryland. Bleetstein testified that a few days after he signed a Union card, he had a converation with Haje, the store manager, and Huntsberger, the assistant manager (J.A. 137). During the conversation someone

(not specifically identified) brought up the idea of having the card returned. Either Haje or Huntsberger told Bleetstein how to go about getting the card returned (J.A. 139-140). Haje supplied the stationery and told Bleetstein the address of the Union (J.A. 139). Bleetstein turned over the letter and a copy he had made to either Haje or Huntsberger (J.A. 138-139), that was the last he saw of his letter.

Gregroy Curti

Gregory Curti is a seventeen year old high school student who works part-time as a small appliance salesman at the Bailey's Crossroads store. Casper is the manager of the store, but a Mr. Carroll is Curti's immediate supervisor (J.A. 166-167). Curti, like the others, signed a Union card in March, 1970. Sometime after signing the card he learned from Carroll that once having joined a union, dues would be taken out of his pay and there was a possibility of other assessments (J.A. 169-170). When he learned these facts, Curti approached General Manager Kottler and asked what he should do to get his card back (J.A. 175).

Kottler suggested Curti write a letter to the Union and supplied Curti with the address (J.A. 170). Curti asked Casper for some stationery (J.A. 172) and wrote the letter (J.A. 291). Although Curti testified that he gave the letter and a copy to Kottler (J.A. 171-172), Kottler denied that this actually occurred (J.A. 257).

ARGUMENT

I. THE COMPANY WAS DENIED PROCEDURAL DUE PROCESS BY THE REFUSAL OF THE TRIAL EXAMINER TO GRANT A CONTINUANCE OF THE HEARING

The Trial Examiner's refusal to grant the Company's request for a postponement of the hearing so that counsel for the Company might have an opportunity to prepare the Company's defense to the new allegations constitutes a clear denial of procedural due process and an obvious abuse of the Trial Examiner's discretion. Such a denial of due process required that the Board dismiss the complaint or remand the case for further hearing.

The failure to grant the requested postponement prejudiced the Company by denying it a fair hearing and an opportunity for adequate representation in the preparation and presentation of its defense to the allegations in the amendment to the complaint.

The Trial Examiner's refusal to grant a continuance in this case does not comport with Board rules. Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, provides:

> After a charge has been filed, if it appears to the regional director that formal proceedings in respect thereto should be instituted, he shall issue and cause to be served on all the other parties a formal complaint in the name of the Board stating the unfair labor practices and containing a notice of hearing before a trial examiner at a place therein fixed and at a time not less than 10 days after the service of the complaint. The complaint shall contain (1) a clear and concise statement of the facts upon which assertion of jurisdiction by the Board is predicated, and (2) a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed.

In addition, Section 102.17 of the Board's rules provides:

> Any such complaint may be amended upon such terms as may be deemed just, prior to the hearing, by the regional director issuing the complaint; at the hearing and until the case has been transferred to the Board pursuant to Section 102.45, upon motion, by the trial examiner designated to conduct the hearing; and after the case has been transferred to the Board pursuant to Section 102.45, at any time prior to the issuance of an order based thereon, upon motion, by the Board.

Thus, by permitting the amendment to the complaint and by refusing to grant a continuance the Trial Examiner failed to accord the Company the ten (10) days before hearing as required by Section 102.15. Nor is the Trial Examiner aided by Section 102.17. While the rule does provide for amendments to complaints at the hearing, it nevertheless demands that amendments be made "upon such terms as may be deemed just". When Section 102.17 is read together with Section 102.15, it becomes clear that a respondent must be afforded at least ten (10) days in which to prepare its defense to unfair labor practice allegations, even if such allegations are contained in an amendment to a complaint and particularly if, as in this case, the amendment contains allegations which are entirely different and completely separate from those in the original complaint.

The governing principles with respect to due process in administrative hearings are to be found in Morgan v. United States, 302 U.S. 1 (1938) which involved an order of the Secretary of Agriculture fixing the maximum rates to be charged by commission men at stock yards. The Secretary's order was held void for failure to allow the full hearing required by the applicable statute. The Court

held that in administrative proceedings of a quasi-judicial character, the liberty and property of citizens must be protected by a fair and open hearing, and that such a hearing embraces not only the right of presenting evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet those claims.

Due process in an administrative hearing includes a fair trial, conducted in accordance with fundamental principles of fair play and applicable procedural standards established by law. Administrative convenience or necessity cannot override this requirement. Swift and Co. v. United States, 304 F.2d 849 (7th Cir. 1962); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964).

On facts similar to those of the present case, the Court of Appeals for the Fifth Circuit denied enforcement of a Board order remedying unfair labor practices. Russell-Newman Mfg. Co., Inc. v. NLRB, 370 F.2d 980 (5th Cir. 1966). In the Russell-Newman case, the court stated:

> Section 102.15 of the Board's Rules and Regulations provides that when the Regional Director issues a formal complaint he shall cause it to be served on all other parties, stating the unfair labor practices and containing a notice of hearing before a trial examiner at a place therein fixed and at a time not less than ten days after service of the complaint.

> Section 102.17 of the Board's Rules and Regulations provides that a complaint may be amended upon such terms as may be deemed just. The charges filed on February 5, 1965, were far beyond the scope of an orindary amendment. They were brand new matters grounded on facts occurring not more than a week prior to the telegraphic notice. These new charges cannot be deemed mere amendments within the meaning of §102.17. Two days notice cannot be "deemed just," for §102.15 requires that the hearing shall be held not less than ten days after the service of a complaint in which the unfair labor practices must be stated. Russell-Newman v. NLRB, supra at page 984.

Applying the rationale of the Russell-Newman case to the facts of the present case, it is obvious that the two days between July 13, 1970, when the Company's counsel was first informed of the General Counsel's intent to file an amendment to the complaint, and July 15, 1970 when the hearing was scheduled to begin, was insufficient notice both under the Board's Rules and Regulations and under applicable principles of procedural due process. Nor were the two additional days, namely July 15 and July 16, 1970, sufficient to permit a reasonable opportunity to prepare the Company's defense to the new allegations, particularly in view of the fact that the Company's counsel was compelled to be in attendance at the hearing on those days. Plainly, the Company's counsel was hindered in the adequate

representation of the Company at the hearing by the Trial Examiner s refusal to grant a continuance. Specifically, he was unable to adequately prepare for cross-examination of adverse witnesses who testified in support of the allegations in the amendments to the complaint.

Accordingly, because there has been a clear failure to abide by the Board's Rules and Regulations and because there has been a denial of procedural due process, prejudicial to the rights of the Company, enforcement of the Board's order at least with respect to the findings based on the amendment, must be denied, or, in the alternative, the case must be remanded to the Board for further hearing.

II. THE BOARD'S FINDING THAT THE COMPANY DISCHARGED EMPLOYEE STEVENSON BECAUSE OF HIS UNION ACTIVITY IN VIOLATION OF SECTION 8(a)(3) AND (1) OF THE ACT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE

The Trial Examiner correctly concluded that employee David S. Stevenson uttered obscenities toward Store Manager Casper and General Manager Kottler during their conversation on March 21,

1970. This conduct on Stevenson's part provides a factual basis for the Company's contention that he was discharged for good cause (J.A. 334).

However, the Trial Examiner and the Board wrongly concluded that the Company seized upon Stevenson's obscene and insulting remarks as a pretext for discrimination (J.A. 335). The Company contends that there is no basis on the record in this case for such conclusion by the Board.

The Trial Examiner appears to find that merely because the Company was aware of Stevenson's Union activity, General Manager Kottler went to the Bailey's Crossroads store on March 21, 1970 "determined . . . to discharge Stevenson for his part in the Union campaign" (J.A. 335). The only basis for such a conclusion is an alleged statement made by Kottler to employee Eudailey on the morning before Stevenson was terminated and during a conversation which also included discussion of the Union, that Stevenson would be discharged that day (J.A. 335).[2/]

2/ Kottler testified that this statement was never made (J.A. 252) and further denied having any conversation with Eudailey on that morning (J.A. 252).

The Trial Examiner (and the Board) further concluded that the Company sought to find a pretext for discharging Stevenson by forcing on him, again, the issue of the bad check which, he had already refused to make good (J.A. 336). This finding is not supported by substantial evidence. While Stevenson may have refused to reimburse the Company for the bad check at the behest of the store manager, it was quite reasonable to assume that he might have taken a different position after a discussion with the general manager of the entire chain. Furthermore, it appears that March 21, 1970 was the first opportunity Kottler had to talk with Stevenson about the matter. Actually, it was only one week after Stevenson had refused Casper's request to reimburse the Company for the value of the merchandise purchased with the dishonored check (J.A. 322). Kottler testified that he did not go to the Bailey's Crossroads store on the morning of March 21, 1970 to fire Stevenson (J.A. 249) but rather intended to have a conversation with Stevenson and Casper to rectify the problem of the dishonored check (J.A. 245-246).

There is no inconsistency in the application to Stevenson of Company policy regarding bad checks. While it may be true, as the Trial Examiner apparently found, that ". . . Salesmen do not have to absorb . . . bad checks" (J.A. 323), Stevenson's case was different in that the Company accepted Saunders' subsequently dishonored check on Stevenson's affirmative recommendation (J.A. 322). Therefore, the Company had good reason to ask Stevenson to make it good after dishonor.

Neither is there any inconsistency, contrary to the Trial Examiner's finding, in the reasons given by the Company's witnesses for the discharge of Stevenson. Both Casper and Kottler testified that the discharge was the result of the events which occurred during their meeting with Stevenson on March 21, 1970. The only difference between the testimony of Kottler and that of Casper is the manner in which they characterized the events which caused the discharge. Kottler testified as the Trial Examiner reported, that he discharged Stevenson because of his behavior at the meeting and not because "he declined to pay [the] check." Casper testified that Stevenson was discharged "because he wouldn't even listen to the terms that [Kottler] wanted to make with him insofar as this check is concerned"

(J.A. 324). It is clear that Casper's characterization of Stevenson's actions and remarks at the meeting and Kottler's version of those events are not inconsistent, and it is obvious from the testimony of both that Stevenson was discharged because of his conduct at the meeting, not because he refused to make good the check. Hence, there is nothing of substance in the record to indicate that the Company used Stevenson's conduct at their March 21st meeting as a pretext to discharge him. On the other hand, the record evidence clearly establishes that the Company lawfully discharged Stevenson because of his improper conduct toward his supervisor and because of his use of insulting and vulgar language.

The evidentiary standard to be applied in judicial review of Board cases is well established. To be sustained, the findings and conclusions of the Board underlying its order must be supported by substantial evidence on the record considered as a whole. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). Moreover, in discharge cases, the long-standing rule is that an employer has the right to discharge an employee for any reason, reasonable or unreasonable, as long as it was not for a reason prohibited by the Act.

Associated Press v. NLRB, 301 U.S. 103 (1936). Thus, in determining whether the Board's findings meet the substantial evidence test, the Court must weigh the evidence tending to show discrimination against the evidence advanced by the Company to show that the discharge was for good cause. As the Court of Appeals for the First Circuit said in NLRB v. Billen Shoe Co., 397 F.2d 801, 803 (1st Cir. 1968):

> We have only too frequently had to remind the Board that a decision on the issue of motive is particularly one which requires consideration of all the evidence, and not bits and pieces which support a decision unfavorable to the employer.

The Court further stated:

> If we were to draw a further lesson from this case, and too many others like it that we have had, it is that it is all too easy to say that adequate cause for discipline was seized upon as pretextual in the case of union representatives. The fact is that adequate cause for discharge is of peculiarly legitimate concern in such instances; management cannot run its plant if union organizers can ride roughshod on the basis of their position. When good cause for criticism or discharge appears, the burden which is on the Board is not simply to discover some evidence of improper motive, but to find an affirmative

> and persuasive reason why the employer rejected the good cause and chose a bad one. The mere existence of anti-union animus in not enough. The fact that the employer may be pleased to effectuate the discharge does not mean that this was his primary motive. NLRB v. Billen Shoe Co., supra at page 803.

The evidence is clear that employee Stevenson used insulting and vulgar language toward his store manager and toward the Company's General Manager in the conversation concerning the dishonored check. Such conduct on the part of an employee is certainly a proper ground for discharge. Whatever else may be in the record as to the Company's anti-union motive, General Manager Kottler was, without question, justified in terminating Stevenson's employment after such an episode. Accordingly, the valid reason for discharge, asserted by the Company must stand, and the Court must deny enforcement of the Board's order insofar as it relates to a violation of Section 8(a)(3) of the Act.

III. THE COMPANY DID NOT VIOLATE SECTION 8(a)(1) OF THE ACT BY RENDERING MINOR, MINISTERIAL ASSISTANCE TO EMPLOYEES WHO WISHED TO WITHDRAW THEIR UNION AUTHORIZATION CARDS

The Union organizing campaign at the Sun Radio stores involved detailed planning and dynamic execution. The tactic used

by the Union is known as the "blitz." As Union representative Chavaree himself admitted, during the course of such a campaign "there is a lot of misinformation that goes out . . ." (J.A. 185). It is not surprising that there was confusion among the Sun Radio employees concerning the significance of signing the cards which were distributed to them. At the Tyson's Corner store, Stevenson solicited signatures between twelve o'clock noon (J.A. 119) and twelve-thirty-five (J.A. 117). During this short period of time, he spoke individually to a number of salesmen, cashiers and stock boys, of whom, at least six signed cards (J.A. 113). It is highly unlikely that these employees engaged in a full discussion about these cards in the short time available. As Mrs. Clark wrote in her letter to the Union: "We were approached at our place of employment, on a busy Sat., when we did not have sufficient time to discuss the matter" (J.A. 302).

Within the next few days the Sun Radio managers were briefed concerning their legal responsibilities in the face of a union organizing campaign. This briefing included the admonition that they were "not to interrogate under any circumstances" (J.A. 263).

This meeting was held on Tuesday, March 24, 1970 and, with the exception of Martin Flynn, none of the employees testified to writing to the Union before Wednesday, March 25, 1970. Flynn, to whom Stevenson made the suggestion that he write to the Union (J.A. 146-147), testified that he wrote to the Union on March 21, 1970 (J.A. 149-150). The letter, however, is dated, in Flynn's handwriting, March 25, 1970 (J.A. 304).

As the result of discussion among their fellow employees and managers during the week following the "blitz", many of the card signers realized that there was much they did not know about unions, and regretted having hastily committed themselves to something about which they know so little. The managers had been informed at their meeting on March 24, 1970 that they could provide employees with the address of the Union and tell them, if they asked, that if they wanted their cards returned, they should write and ask for them. Many employees did just that.

Although it is obvious that not all of the withdrawal letters were written on store stationery, many of the employees used

stationery that was available in the store offices to write to the Union. As General Manager Kottler explained, "It is customary for our salesmen to use stationery and envelopes and stamps" (J.A. 264). Mrs. Clark, too, testified that there would be nothing unusual in an employee asking for stationery and stamps (J.A. 135). Kottler also suggested to some employees that if they wrote to the Union concerning their cards, they should certify their letters (J.A. 265). It is not unreasonable to conclude that these employees would not go out of their way to do this, but probably certified their letters with the materials readily available in the store offices.

None of the employees who offered direct testimony concerning the writing of letters copied a model letter. An examination of the letters themselves shows that only two are written with the same language as others (J.A. 292, 293, 299, 230), and this is more likely the result of employee collaboration than management dictation.

In sum, because of the tactics used by the Union organizers, many employees signed Union cards hastily and without much thought. Upon later reflection and after free discussion with others, some of these employees sought to nullify what they now thought to be unwise

action. Some management personnel assisted these employees in performing a ministerial act which the employees had independently concluded should be done. This action did not amount to unlawful interference in violation of Section 8(a)(1) of the Act.

Many of the facts in this case are similar to those in a case decided by the Board in KDI Precision Products, Inc., 176 NLRB No. 18 (1969), 73 LRRM 1190, enforced 436 F.2d 385 (6th Cir. 1971). In that case two employees asked the Company how they could revoke their union authorization cards. In response to this request the company wrote each employee a letter explaining how they could cancel their union authorization cards by writing a letter to the Union saying, ". . . I hereby cancel and revoke the union authorization card I signed . . . ." The letter in the KDI case also stated:

> "Such a letter, of course, must be signed and dated and the writer should be sure to keep a copy of it. Your supervisor or anyone in Personnel will be glad to answer any questions about your rights in this respect." KDI Precision Products, Inc., supra at page 7.

The genesis of this episode at KDI came from an employee who brought another employee to the superintendent's office to help her cancel her

membership. In the present case, information on how to cancel union cards first came from Stevenson, through Flynn, to the employees at Tysons Corner.

Thus, on the basis of the KDI Precision Products case, the Board must concede that, absent employer threats or promises of benefit to employees for the purpose of inducing them to withdraw from a union, giving information on how to revoke authorization cards or rendering minor assistance to employees in effecting such revocation does not violate the Act. The record reveals no threats or promises of benefits were made to employees at the Company's Bailey's Crossroads or Marlow Heights stores, and therefore, the Company action in attempting to persuade employees at those stores to revoke their authorization cards was not unlawful. With respect to the Tysons Corner store, the Board argues that the Company's action violated the Act because it occurred in the context of other unfair labor practices. However, these other unfair labor practices occurred some time prior to the revocation incidents and in unrelated circumstances. The record does not establish that the employees who subsequently revoked their authorization cards, except for Eudailey

and Flynn, were privy to statements made by General Manager Kottler or Store Manager Vogin which the Board found violated Section 8(a)(1), and therefore, there is no basis for the Board's contention that the revocations occurred in the context of other unlawful conduct. It is clearly improper for the Board to conclude that all of the Company's subsequent lawful conduct, is tainted by prior, unrelated conduct which may have violated the Act.

IV. THE BOARD PROPERLY REFUSED TO ORDER THE ADDITIONAL REMEDIES REQUESTED BY THE UNION

The Union contends that the Board erred in not going beyond its traditional remedies in this case because the unfair labor practices committed by the Company were "flagrant". The Company contends: (1) that its actions were not flagrant violations of the Act and that if any unfair labor practices were committed they were, in fact, minor and inconsequential, and (2) that the traditional remedies ordered by the Board cannot be disturbed unless it is shown that they are insufficient as a matter of law, and the Union has failed to make such a showing.

It is well settled that the Act gives to the Board the authority to fashion remedies which effectuate the policies of the Act.

Section 10(c) of the Act provides for issuance of remedial orders, in part, as follows:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him . . . . Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order . . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

Thus, the duty imposed on the Board with respect to its remedial orders is framed in very general terms.

Accordingly, the Supreme Court has held that the Board has very broad discretion in determining what remedies will effectuate the policies of the Act. Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 216 (1964); NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 349 (1953). Moreover, as this Court has held, the Board's choice of remedies will not be disturbed in the absence of a clear abuse of discretion. United Steel Workers v. NLRB (Northwest Engineering), 126 U.S. App. D.C. 215, 216, 376 F.2d 770, 773 (1967), cert. denied, 388 U.S. 932; International Union of Electrical Workers v. NLRB (SNC Mfg. Co.), _____ U.S. App. D.C. _____, 434 F.2d 473, 478 (1970).

In the Electrical Workers case this Court said:

> Just what remedies are necessary to insure that a decision and order of the Board is effective is a matter largely for the Board's discretion. To successfully attack the Board's remedy one must show that the remedies prescribed by the Board are clearly inadequate in the light of the findings of the Board. The Board's wide discretion to fashion appropriate remedies insolates its action in the case from judicial intervention.

In its Brief, at pages 9 and 10, the Union cites numerous cases in which the Board has ordered, and in which courts of appeals have approved, remedies which go further than the Board's "traditional"

remedial orders. Reliance on such cases is misplaced. There is no doubt that the Board has the power to order some broader remedies when, in its discretion, the circumstances warrant them. The issue, here, is whether the Board can be required to order such remedies. The law is clear that the Board can be required to order additional relief only when the remedies prescribed "will be so ineffective to enforce the policies of the Act as to be insufficient as a matter of law." Amalgamated Clothing Workers v. NLRB (Hamburg Shirt Corp.), 125 U.S. App. D.C. 275, 281, 371 F.2d 740, 746 (1966). Contrary to the contentions of the Union, the Board's remedial order in the present case does not fall in this category.

The order provides remedial action for each violation of the Act which the Board found had been committed. Thus, the Board concluded that the Company discriminatorily discharged employee Stevenson and ordered the Company to offer him reinstatement without prejudice to any of his rights and privileges and with full back pay. The Board found that the Company violated Section 8(a)(1) of the Act in several different ways, and its cease and desist order covered, in great detail, each act which the Board concluded was unlawful.

The Board further ordered the Company to post for sixty (60) days, a fourteen (14) paragraph Notice to Employees stating that an agency of the United States Government had found that the Company violated the law and advising employees that the Company would not engage in certain conduct which the notice delineated with great particularity.

The Union places considerable emphasis on the fact that the Board's Trial Examiner characterized the Company's conduct as "flagrant", and contends, therefore, that extraordinary remedies are required. While the aggravated nature of unfair labor practices is one factor considered by the Board in exercising its broad discretionary power to choose remedies, it is certainly not the only factor.

Other factors present in this case militate against the need for extraordinary relief. There is no prior history of unfair labor practices committed by the Company. The Company and the Union are parties to a collective bargaining agreement covering employees in leased departments at G. E. M. stores and there is no evidence that the relationship between the Company and Union at these

locations has been antagonistic. The circumstances of this case indicate that the Union has not been hampered, in any significant way, in presenting its case to the Company's employees. Stevenson freely distributed Union literature and authorization cards among employees at the Company's stores during working hours and in working areas. The Company's unfair labor practices (if any) have created no serious imbalance in the ability of the parties to communicate with employees such as would impel the Board to impose a more drastic remedy. Nor is there anything in the record to indicate that the Union would be unduly restricted in a future organizational campaign.

The Union seeks an order requiring the Company to mail notices to employees and to post the notice for a period of six (6) months. There is nothing in the circumstances of this case which would necessitate such relief. Nothing in the record indicates that employees would not see the notice posted at each Company store. See, Vernon Calhoun Packing Co., 173 NLRB 753, 767 (1968) and International Union of Operating Engineers, Local 825, 173 NLRB 955 (1968). Nor is this case the same as Decaturville

Sportswear Company, Inc. v. NLRB, 406 F.2d 886 (6th Cir. 1969), cited by the Union, where the employer's unfair labor practices were specifically directed at the union's efforts to communicate with employees. The unfair labor practices in the instant case, if directed at all, were directed at inducing employees to forego the Union, after the Union had already communicated its message to them.

Moreover, there is every reason to believe that employees will have ample opportunity to see the Board's notice if it is posted for sixty (60) days, since they are engaged in retail sales activity which does not require them to be away from the Company's premises for any length of time.

In addition, the Union asked the Board to order the Company to make its premises available to the Union for an organizing meeting of employees on company time and at company expense. Such an extraordinary remedy is clearly not appropriate in this case. As previously shown, the Union has, in the past, had no difficulty in communicating with employees. The Company is not a continuing offender with a long history of unfair labor practices, and the conduct of the Company in this case is not so aggravated or flagrant as to

make such unusual relief essential. See, International Union of Electrical Workers v. NLRB (Scotts, Inc.), 127 U.S. App. D.C. 303, 305 n. 4, 383 F.2d 230, 232 n. 4 (1967), cert. denied, 390 U.S. 904.

In its Brief, the Union quoted at length from the opinion of this Court in International Union of Electrical Workers v. NLRB (Tidee Products), 138 U.S. App. D.C. 249, 426 F.2d 1243 (1970), to support its contention that additional remedial relief is essential to remedy the unfair labor practices in this case. The Tidee Products case, however, is distinguishable. The unfair labor practices in the Tidee case were obviously more aggravated and flagrant than in the present case. Secondly, the Court in the Tidee case was concerned that the Board, in its decision, had not discussed the union's request for additional remedial relief, nor explained its reasons for declining to go beyond its traditional remedies. The trial examiner had concluded that additional remedies were warranted but refused to order them because he believed he had no authority under Board law to do so. The Board affirmed the trial examiner without comment concerning the remedial order.

In the present case, unlike Tidee, the Trial Examiner specifically found that the Company's unfair labor practices could be remedied adequately by an order, which he recommended, containing broad cease and desist provisions and requiring that notices be posted in all Company "Sun Radio" stores. In addition, the Trial Examiner concluded that "there was no need to depart from the Board's normal remedial policies in the extreme manner suggested by the Union" (J.A. 338). By affirming the Trial Examiner the Board adopted, in total, the Trial Examiner's specific findings concerning the lack of necessity for departing from the Board's customary remedial policies.

Accordingly, the Company respectfully urges that the remedial order issued by the Board in this case is plainly adequate, and there has been no showing that additional relief is essential as a matter of law.

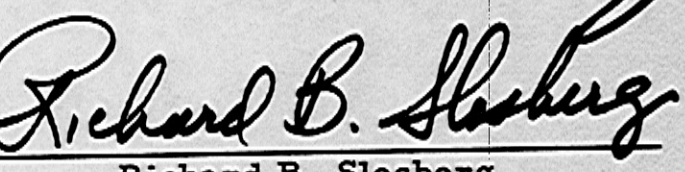
CONCLUSION

For the foregoing reasons, the Company respectfully requests that the Court enter a judgment denying the Union's petition to review and that the Court enter a further judgment denying enforcement of the Board's order.

Respectfully submitted,

ARENT, FOX, KINTNER, PLOTKIN
& KAHN

By 
Allen G. Siegel

By 
Richard B. Slosberg

800 Federal Bar Building
1815 "H" Street, N. W.
Washington, D. C. 20006
Telephone: (202) 347-8500

Attorneys for C.W.F. Corporation

August, 1971.

Nos. 71-1137 and 71-1255

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1137

RETAIL STORE EMPLOYEES UNION LOCAL 400,
RETAIL CLERKS INTERNATIONAL ASSOCIATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

C.W.F. CORPORATION,
Intervenor.

No. 71-1255

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

C.W.F. CORPORATION,
Respondent.

On Petition to Review and On Application for Enforcement
of an Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

EUGENE G. GOSLEE,
Acting General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

WARREN M. DAVISON,
Deputy Assistant General Counsel,

National Labor Relations Board.

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

INDEX

AUTHORITIES CITED

---

* Authorities chiefly relied upon.

---

* Authorities chiefly relied upon.

---

* Authorities chiefly relied upon.

---

* Authorities chiefly relied upon.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1137

RETAIL STORE EMPLOYEES UNION LOCAL 400,
RETAIL CLERKS INTERNATIONAL ASSOCIATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

C.W.F. CORPORATION,
Intervenor.

No. 71-1255

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

C.W.F. CORPORATION,
Respondent.

On Petition to Review and On Application for Enforcement of an Order of the National Labor Relations Board

---

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF QUESTIONS PRESENTED

No. 71-1255. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(1) of the Act by coercively interrogating employees about their attitude toward

the Union and their signing of Union cards, by threatening employees with discharge for having signed Union cards, by soliciting employees to withdraw their Union authorization cards, and by assisting employees in so doing; and that it violated Section 8(a)(3) and (1) by discharging employee David Stevenson because of his union activities.

No. 71-1137. Whether the Board properly declined to grant the additional remedial relief here sought by the Union.

In accordance with Rule 8(d) of the General Rules of this Court, the Board states that this case is before the Court for the first time.

REFERENCES TO RULINGS

No. 71-1137 is before this Court upon the petition of the Union[1] filed pursuant to Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), to review an order of the Board issued February 17, 1971 and reported at 188 NLRB No. 94 (A. 312-345, 359-361).[2] In No. 71-1255, the Board, pursuant to Section 10(e) of the Act, has filed an application to enforce the same order as issued against C.W.F. Corporation. On April 22, 1971, the Court granted the Company's motion to intervene in No. 71-1255; on April 16, 1971, the Court granted the Board's motion to consolidate Nos. 71-1137 and 71-1255. This Court has jurisdiction under Section 10 (e) and (f) of the Act, and no jurisdictional issue is presented.

---

1 Retail Store Employees Union Local 400, Retail Clerks International Association.

2 "A." references are to the portions of the record printed in the appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

This case arose out of the Union's attempts to organize the Company's employees and the Company's conduct aimed at defeating the Union's campaign. The Board found that the Company committed violations of Section 8(a)(1) of the Act by coercively interrogating its employees concerning their attitude toward the Union and their signing of Union cards, threatening employees with discharge for having signed Union cards, soliciting employees to revoke their Union authorization cards, and assisting them in so doing. The Board further found that the Company violated Section 8(a)(3) and (1) of the Act by discharging employee David Stevenson because of his Union activity. The facts upon which these findings are based are summarized below.

A. The Union's organization campaign

The Company, at various locations in Maryland and Virginia, is engaged in the retail sale of radios, television sets and electrical appliances, and in addition also markets this same merchandise in departments leased from GEM, Inc. which has stores located in the Washington, D.C. metropolitan area (A. 314, 316-317; 11). While those of the Company's employees who work in the GEM stores are covered by a collective bargaining agreement between GEM and the Union, the employees at the Company's other retail outlets are not represented by any labor organization (A. 317; 188, 195-196). On March 17, 1970,[3] employee David Stevenson,

---

[3] Unless otherwise indicated all dates refer to 1970.

a salesman at the Company's Bailey's Crossroads, Virginia store, obtained from the Union's organizing director Union authorization cards, and copies of a booklet issued by the Board entitled "To Protect Rights of the Public Etc." (A. 319; 17). The following day, Stevenson brought these materials to the Bailey's Crossroads store, distributed them among the employees, and received thirteen signed Union authorization cards, including one executed by the store's assistant manager, David Turko (A. 319; 17-18). Two days later, on March 20, the Union conducted a "blitz" organizational campaign by sending ten organizers to the Company's various stores to distribute cards among the employees (A. 319; 62). Almost immediately, the Company's general manager, Morris Kottler, became aware of the Union's efforts (A. 319; 251).

B. The Company's response

1. Kottler's conversation with Eudailey

On March 21, the day after the Union's "blitz" campaign, General Manager Kottler went to the Bailey's Crossroads store to conduct a sales meeting and to "take care of a few problems" (A. 320; 245-246). After the sales meeting, Kottler approached salesman Gerald Eudailey and asked him what he thought about the Union, whether he had signed a Union card, and whether he had joined the Union (A. 320; 69, 84, 104, 110-111). When Eudailey admitted that he had signed a card, Kottler asked him to withdraw his card and informed him that he "could get fired over it" (A. 320; 104-105, 110-111). Kottler next asked Eudailey what he knew about Stevenson and the Union, and concluded the conversation by stating, "You know Stevenson's going to get fired today" (A. 320-321; 69, 84-86, 104, 111). When Stevenson arrived at work, Kottler took him

and Store Manager Charles Casper to a back room to discuss a bad check which a customer had given to Stevenson (A. 323; 216).

2. The discharge of Stevenson

About a month earlier, one of Stevenson's customers had paid by check for a television set. In conformity with established Company procedure (A. 317-318; 308-312, 192-194), the customer had provided certain identification, one piece being a Howard University pass (A. 322; 13, 210). When Stevenson brought the check to Casper for his approval, the store manager was at first reluctant to accept the check because the customer's identifying documents did not satisfy the standards established by the Company for determining when to accept a personal check from a customer in payment for merchandise (A. 322; 210). However, Casper approved the check on Stevenson's representation that although he was not personally acquainted with the customer, he knew that the customer was a teacher and was "as good as gold" (A. 322; 210, 224). After the check was dishonored and after Casper had unsuccessfuly attempted to locate the customer, he informed the Company's Vice-President, Joseph Warsaw, who in turn ordered Casper to tell Stevenson that the salesman would have to reimburse the Company for the cost of the merchandise sold (A. 322; 211-213). On March 14, Casper asked Stevenson to reimburse the Company, but Stevenson refused (A. 322; 13, 214-215). A few days later, he asked Casper whether he was "in any trouble" over the check, and Casper assured him that he was not (A. 323; 17). Employee Gerald Eudailey, another salesman, having overheard this conversation between Casper and Stevenson, again asked Casper whether Stevenson would have to reimburse the Company and Casper replied in the negative, that "it was Company policy that salesmen did not have to absorb bad checks" (A. 323; 64, 72-74). That this was the Company's policy

was seemingly confirmed by Kottler and Casper, both of whom testified that they were unable to recall a situation in which a salesman had been requested to reimburse the Company for a dishonored check tendered by a customer (A. 319; 222-223, 254). In addition, although a Company memorandum dealing with the procedures to be followed when a customer tendered a check declared that any deviation from the procedures therein set forth would be cause for discharge, the Company's comptroller testified that to his knowledge no manager had ever been discharged because of a failure to observe the procedures set out in the memorandum (A. 318; 196).

This was the background of the March 21 meeting between Casper, Kottler and Stevenson. Kottler, having already been told by Casper of Stevenson's refusal to make the check good, opened the discussion by asserting that unless Stevenson made the check good, "and we'll work out terms on it," Stevenson "was going to be through." Stevenson remonstrated loudly that he would not do so (A. 324; 216, 228-230). After telling Stevenson to calm down and be a gentleman, Kottler said that he had been informed by Casper that Stevenson told Casper to accept the check, that the customer was a teacher and that it was a good check (A. 324; 216). At this point Stevenson said that Casper was a liar and that he was not going to listen to Kottler any longer (A. 324, 216-217). Kottler then discharged Stevenson on the spot (A. 324; 217, 229-230).

3. The Company's further conduct

In addition to Kottler's conversation with Eudailey on March 21 in which Kottler asked Eudailey whether he had signed a card and what he thought about the Union, requested Eudailey to withdraw his card and warned that he could get fired over it (*supra*, p. 4), the record also shows that in the days immediately following the Union's organizational

effort, the Company engaged in further anti-Union activities. Thus, immediately after Stevenson was discharged, he went to the Company's Tyson's Corner, Virginia store and there successfully solicited the signatures of six or seven employees to Union cards (A. 320, 323; 113-114, 145). When Store Manager Vogin leared that employees were signing cards, he told them that they were "stupid" for signing the cards and asserted that "anyone who had signed one would be fired as of that evening" (A. 324; 145-146). That same day or a few days later, Vogin told a group of clerks at the store's office that "they weren't going to have their jobs here very long if they signed that Union card" (A. 325; 184). Immediately after Stevenson left the store, Vogin followed him outside and demanded that Stevenson give the signed cards back to the employees, but Stevenson refused (A. 325; 115). Upon returning to the store, Vogin asked employee Martin Flynn if he had signed a Union card (A. 325; 153). When Flynn replied that he had, Vogin said that he was "dumb and stupid" for having done so and ordered Flynn to "chase after" Stevenson and to get his card, and the cards of other employees, back (A. 325; 146, 153-154). Flynn did so, but Stevenson refused to return the cards to him; he told Flynn, however, that employees who wanted their cards back could get them by writing to the Union (A. 325; 146-147, 154-155). Flynn conveyed this information to Vogin, who immediately told Flynn that if he wrote a letter to the Union requesting the return of his card he "wouldn't be fired" (A. 325, 147-148).

Vogin also directly solicited other employees to write to the Union seeking return of their cards, and rendered assistance to them in doing so. At Vogin's behest, six employees wrote letters to the Union requesting the return of their cards (A. 326; 128-132, 148-149, 159-160, 301-306). Vogin directly assisted four employees, two of whom he

asked specifically whether they had in fact signed cards, in seeking return of their cards by giving them the Union's address, stationery, and certified mail forms. He also requested the employees to make copies of what they wrote (A. 326; 130, 149, 160, 175-181). The employees neither paid the postage for their letters nor mailed them themselves; instead, they gave their letters to Vogin, who mailed the originals to the Union by certified mail (A. 326; 148-149, 160, 180-181, 131-132, 301-306). Additionally, Vogin aided two employees in drafting the letters they wrote to the Union (A. 326; 150-151, 179). Thus, employee Flynn testified that Vogin "coached" him and gave him "an approximation of what [he] should write" (A. 326; 150). Also, Vogin showed employee Ruby a copy of a letter written by employee Seymour and instructed her to "make up a letter like this and you can get your card back". Ruby followed Vogin's instructions and merely "changed the wording in it a little" (A. 326-327; 179).

At the same time that Vogin was soliciting and assisting the Company's Tyson's Corner employees to withdraw their signed Union cards, Company officials were engaging in similar conduct at two of the Company's other stores. Thus, Carroll, the manager of the small appliance department at the Company's Bailey's Crossroads store, asked part-time salesman Gregory Curti whether he had signed a Union card. When Curti replied that he had, Carroll asserted that his signing of a Union card meant that he was joining the Union which also meant that the Union could take dues out of his check, and that if the Company went on strike the Union could take so much out of his pay to support the strike (A. 327; 166-168, 169-170, 288-289). Carroll concluded the conversation by telling Curti, "I think it's a pretty good idea that you do get your card back" (A. 327; 170). After his conversation with Carroll, Curti asked General Manager Kottler how he could get his card back. Kottler

told him to write a letter to the Union at an address appearing on a paper provided by Kottler and to make a copy of the letter (A. 327; 170-171). Curti immediately drafted the letter in the store and gave the original and a copy to Kottler (A. 327; 171-172, 236). Additionally, Kottler spoke to other employees at the Bailey's Crossroads store concerning the Union cards which they had signed (A. 328; 240-241, 254-255). Kottler informed them that in order to withdraw their cards they would have to write to the Union, and Store Manager Casper provided these employees with stationery, postage and certified mail forms (A. 328; 237-239, 241-242, 258-259). Kottler then mailed all of the letters to the Union by certified mail (A. 328; 236-237, 289-294).

This same pattern of conduct was repeated at the Company's Marlow Heights, Maryland store. There, in the presence of Store Manager George Haje, Assistant Manager Huntsberger asked employee Ira Bleetstein whether he had signed a card and, when the employee admitted doing so, Haje told Bleetstein how to go about getting his card invalidated and he advised Bleetstein to write to the Union (A. 328-329; 137-140). Bleetstein wrote a letter to the Union asking for the return of his card on stationery provided by the Company and also made a copy of his letter (A. 329; 140-141, 296). Bleetstein did not mail the letter, nor did he supply the postage or prepare the certified mail form (A. 329; 140-141). Bleetstein's letter and the letters of five other employees at the Marlow Heights store were received by the Union by certified mail on March 25 (A. 329; 295-300).

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board found that the Company violated Section 8(a)(1) of the Act by threatening to discharge employees for having signed Union authorization

cards, by coercively interrogating employees concerning their attitude toward the Union and their signing of Union cards and by inducing and soliciting employees to request the return of their cards from the Union and by assisting them in so doing. The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by discharging employee Stevenson because of his Union activities.

The Board's Order (A. 339-345, 361) requires the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining or coercing employees in the exercise of their rights as guaranteed by Section 7 of the Act. Affirmatively, the Company was ordered to offer full and immediate reinstatement to Stevenson to his former or substantially equivalent position, to make him whole for any loss of earnings he may have suffered by reason of the Company's discrimination against him, and to post a notice at all its stores for sixty days. The Board also denied certain additional relief sought by the Union (discussed *infra*, pp. 19-22).

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD SUPPORTS THE BOARD'S FINDING THAT THE COMPANY INTERFERED WITH, RESTRAINED AND COERCED ITS EMPLOYEES, IN VIOLATION OF SECTION 8(a)(1) OF THE ACT

As set forth in the Statement, the credited evidence[4] discloses that the Company, immediately upon learning of the Union's organizing effort

---

[4] Before the Board, the Company urged the rejection of those of the Trial Examiner's credibility resolutions that were adverse to its position. The Examiner carefully considered the conflicting versions of the events described herein and resolved the (con'td)

among its employees, embarked upon a course of unlawful conduct, both before and after the discharge of Stevenson (discussed *infra* pp. 15-19), designed to blunt the Union's campaign. Thus, the record shows that on the day of Stevenson's discharge, Kottler asked Eudailey what he thought about the Union, whether he had signed a Union card or joined the Union, and upon learning that Eudailey had signed a card, Kottler informed him that he could get fired over it and he asked Eudailey to withdraw his card. Moreover, on the day of Stevenson's termination, Store Manager Vogin, after learning that some of the employees had signed cards, asked Flynn and two other employees whether they had signed Union cards, and upon learning that they had, he told them that they were "dumb" and "stupid" for having done so. He then admonished the employees that anyone who had signed a Union card would be fired as of that evening, and he warned the clerks at the store that they were not going to have their jobs very long if they signed a Union card (*supra*, p.7). That such blatant threats of discharge because of Union

---

[4] (cont'd) conflicts in credibility (see, *e.g.*, A. 313; 321 n. 15; 322 n. 17; 323 n. 19; 324, notes 20 and 21; 325 n. 22; 327 n. 26). It is settled law that the resolution of questions of credibility is a matter for the trier of fact, and will not normally be overturned by a reviewing court. *Joy Silk Mills v. N.L.R.B.*, 87 U.S. App. D.C. 360, 369, 185 F.2d 732, 741 (1950), cert. denied, 341 U.S. 914; *United Steelworkers v. N.L.R.B. (Quality Rubber Co.)*, ___ U.S. App. D.C. ___, 430 F.2d 519, 520 (1970). We submit that the Examiner's credibility resolutions, adopted by the Board, are entitled to affirmance on review.

activity contravene Section 8(a)(1) of the Act is, we submit, too clear to require extended discussion. See, *e.g.*, *International Union, UAW v. N.L.R.B. (Preston Prod. Co.)*, 129 U.S. App. D.C. 196,201, 392 F.2d 801, 806 (1967), cert. denied, 392 U.S. 906. Furthermore, as the interrogation of employees about their attitude toward the Union and their signing of Union Cards occurred in a context of unlawful threats of discharge, it likewise was coercive and a violation of Section 8(a)(1) of the Act. *Amalgamated Clothing Workers of America v. N.L.R.B. (Sagamore Shirt Co.)*, 124 U.S. App. D.C. 365, 378, 365 F.2d 898, 911 (1966); *Joy Silk Mills v. N.L.R.B.*, 87 U.S. App. D.C. 360, 368, 185 F.2d 732, 740 (1959), cert. denied, 341 U.S. 914; *Amalgamated Clothing Workers v. N.L.R.B. (Winfield Mfg. Co.)*, ____U.S. App. D.C. ____, 424 F.2d 818, 825 (1970).

Finally, the Company climaxed its anti-Union efforts by soliciting its employees to revoke or withdraw their signed Union authorization cards. Thus, as noted above, Tyson's Corner Store Manager Vogin, after threatening his employees with discharge for having signed Union cards and having unsuccessfully attempted to secure return of the employees' signed cards from Stevenson, directly solicited the employees to write to the Union seeking return of their cards. The Company rendered far more than mere ministerial assistance to these employees, for Vogin provided them with the Union's address, stationery and certified mail forms. Moreover, the employees did not mail the letters to the Union, but instead gave them to Vogin who in turn mailed them to the Union, the Company paying the postage. In addition, Vogin rendered further assistance to some employees by instructing them as to the language they should use in their letters to the Union.

A similar pattern of conduct occurred contemporaneously at two of the Company's other stores. Thus, at Bailey's Crossroads, a management official told an employee that he thought "it was a pretty good

idea" if the employee got his card back (*supra,* p. 8). Moreover, Kottler spoke to other employees about the cards they had signed, telling them that in order to withdraw their cards they would have to write to the Union. They Company provided the postage, certified mail forms and stationery for this purpose and the employees gave their letters to Kottler, who mailed them to the Union (*supra,* p. 9). Furthermore, six employees at the Company's Marlow Heights store, at the urging of management officials, wrote to the Union seeking return of their cards — the Company supplying paper, postage and the certified mail forms (*supra,* p.9). The Company's action at its Tyson's Corner store in seeking to induce its employees to write to the Union to revoke their signed authorization cards plainly contravened Section 8(a)(1) of the Act, occurring as it did in the context of unlawful threats to discharge the card signers. And this same conclusion is equally justified with respect to the employees at the Bailey's Crossroads and Marlow Heights stores, where Company officials made it clear to the employees that they were interested in the employees' writing to the Union to withdraw their cards. Accordingly, the Board's finding of an 8(a)(1) violation is equally warranted with respect to these employees. *N.L.R.B. v. Hill & Hill Truck Lines,* 266 F.2d 883, 885-886 (C.A. 5. 1959); *N.L.R.B. v. Birmingham Pub. Co.,* 262 F.2d 2, 7-8 (C.A. 5,1958); *N.L.R.B. v. H.W. Elson Bottling Co.,* 379 F.2d 223, 225-226 (C.A. 6, 1967); *Amalgamated Clothing Workers v. N.L.R.B. (Winfield Mfg. Co.),* ____U.S. App. D.C. ____, 424 F.2d 818, 824 (1970).

The Company's reliance on *K.D.I. Precision Prod. Co.,* 176 NLRB No. 18 (1969), 73 LRRM 1190, 1191, enforced 436 F.2d 385 (C.A. 6, 1971), is misplaced. In that case, the request for information concerning how signed authorization cards might be revoked came from the employees themselves, whereas in the instant case management representatives solicited and induced employees to withdraw from the Union.

Additionally, in the *K.D.I.* case the company made no promises of benefits or threats of reprisals in connection with answering the inquiries of its employees; in the case at bar, to the contrary, the solicitation of employees to revoke their authorizations came after the discriminatory discharge of the Union's key supporter, and occurred in the context of unlawful threats made by Company officials to discharge employees who had signed cards. Nor may the Company seek to justify its action by asserting that because of the Union's organizing tactics, many employees signed cards hastily but that upon reflection they sought to nullify their action. Such a claim is absolutely devoid of record support and, in any event, as the Union did not seek recognition as the employees' bargaining representative on the basis of the signed cards, the employees would eventually have had an opportunity to vote in a Board-conducted secret ballot election whether they wanted the Union to represent them.[5]

---

[5] Before the Board, the Company claimed that those portions of the complaint which were amended two full working days prior to the opening of the hearing in the instant case should be dismissed or remanded for further hearing on the ground that the Company was denied procedural due process by the Trial Examiner's denial of the Company's request for a ten-day continuance which it allegedly required to enable it to prepare its defense to the amendments. Since, as we show below, the Trial Examiner did not commit a clear abuse of discretion in denying the continuance sought by the Company, his ruling is entitled to affirmance by this Court. *N.L.R.B. v. Dal-Tex Optical Co.*, 310 F.2d 58, 62 (C.A. 5, 1962); *N.L.R.B. v. Taxicab Drivers Local 777*, 340 F.2d 905, 909 (C.A. 7, 1964); *N.L.R.B. v. Siris Prod. Corp. of Virginia*, 186 F.2d 502, 503 (C.A. 4, 1951); *N.L.R.B. v. Somerville Buick Inc.*, 194 F.2d 56, 59 (C.A. 1, 1952). Thus, Section 102.17 of the Board's Rules and Regulations, Series 8, as amended, does not provide for an automatic ten-day continuance when a complaint is amended but rather permits a postponement (which may be longer or shorter than ten days) "upon such terms as may be deemed just." The Company's attempt to read into the rule the ten-day time period provided by Section 102.15 between the issuance of a complaint and the date of hearing must be rejected, for that rule applies solely to the issuance of the *original* complaint, and does not relate to amendments thereto. Furthermore, the Company's reliance on *Russell-Newman Mfg. Co., v. N.L.R.B.*, 370 F.2d 980 (C.A. 5, 1966), is misplaced. There, the General Counsel did not inform company counsel of his intention to amend the

(cont'd)

II. SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING EMPLOYEE DAVID STEVENSON BECAUSE OF HIS UNION ACTIVITIES

The discharge of a "leading union advocate is a most effective way of undermining a union organizational effort." *N.L.R.B. v. Longhorn Transfer Service, Inc.*, 346 F.2d 1003, 1006 (C.A. 5, 1965). We submit that the record supports the Board's finding that the Company discharged Stevenson for just such a reason. Thus, Stevenson, who was concededly a good salesman (A. 321; 244), initiated the Union's campaign by going to the Union and obtaining literature and authorization cards on March 17. On March 18, he distributed this material among the employees at the Bailey's Crossroads store and obtained 13 signed authorization cards, one signed by the store's assistant manager. Two days later, on March

---

[6] (cont'd) complaint until the working day immediately preceding the hearing, the facts upon which the amendments were based had arisen only a few days prior to the date set for the hearing, and the company's defense was limited to an offer of proof made at the close of the hearing. *Russell-Newman Mfg. Co., supra,* at 984.

The facts of the case at bar disclose no abuse of discretion. Here, the General Counsel notified Company Counsel if his intention to amend the complaint two full working days prior to the date set for the hearing (A. 307). At the request of the Trial Examiner (A. 9), the General Counsel refrained from presenting on the first day of the hearing that portion of his case which pertained to the amendments (A. 19-20), and the hearing did not reconvene on the second day until 1:30 p.m. (A. 98-99). Thereafter, the hearing was recessed for three days at the Company's request thereby affording the Company additional opportunity to investigate the amended allegations and to prepare its defense, which Company counsel agreed to do (A. 143-144). In addition, the amendments to the instant complaint were "additions to" or "refinements of" (*N.L.R.B. Russell-Newman Mfg. Co., supra,* 984) the original complaint and related to events which occurred contemporaneously with the Section 8(a)(1) and (3) allegations contained in the complaint. On this record, therefore, the Board properly concluded that the Company had ample time to investigate the amended allegations and to prepare its defense, and hence the Company's request for a continuance was properly denied.

20, the Union followed Stevenson's initial efforts with a "blitz" organizational drive carried on at all of the Company's stores (*supra*, p. 4). The record shows that Company officials were fully aware of the Union movement and of Stevenson's key role therein, and equally makes plain, as demonstrated by the Company's unlawful conduct described above which occurred contemporaneously with and subsequent to Stevenson's discharge, that it was adamantly opposed to the unionization of its employees. Thus, in a conversation with employee Gerald Eudailey shortly before Stevenson's termination, General Manager Kottler inquired of the employee concerning his attitude toward the Union and whether he had signed a Union card, asked Eudailey to withdraw his card and told him that he "could get fired over it" (*supra*, p. 4). Kottler then asked Eudailey what he knew about Stevenson and the Union, and concluded the conversation by stating that "you know Stevenson's going to get fired today" (*supra*, p. 4).

We submit that this statement by Kottler, in the context of its occurrence, constituted "an outright confession of unlawful discrimination"[6] and, without more, warrants affirmance of the Board's Section 8(a)(3) finding, for Stevenson was in fact discharged just minutes later. In any event, this statement, coupled with the other factors here presented – the evidence of Stevenson's good work record, the timing of the discharge just after the organizing campaign had begun, and the Company's demonstrated hostility to the unionization of its employees as shown by its contemporaneous and subsequent unlawful conduct – provide ample support for the Board's finding that Stevenson's discharge was discriminatorily motivated. See, *e.g.*, *Retail Store Employees, Local 880 v. N.L.R.B.*

---

6 *N.L.R.B. v. Ferguson*, 257 F.2d 88, 92 (C.A. 5, 1958); *N.L.R.B. v. John Langenbacher Co., Inc.*, 398 F.2d 459, 463 (C.A. 2, 1968), cert. denied, 393 U.S. 1049.

(Kinter Bros.), ____U.S. App. D.C. ____, 419 F.2d 329, 331-333 (1969); *Food Store Employees, Local 347 v. N.L.R.B. (Heck's, Inc)*, 135 U.S. App. D.C. 341, 345, 418 F.2d 1177, 1181 (1969); *Southwest Regional Joint Board v. N.L.R.B. (Levi Strauss & Company)*, ____U.S. App. D.C. ____, ____ F.2d ____(1970), 76 LRRM 2033, 2036.

The Board's conclusion in this regard is bolstered by the fact that the reason proffered by the Company for Stevenson's discharge fails to withstand scrutiny. *N.L.R.B. v. Griggs Equipment, Inc.*, 307 F.2d 275, 278 (C.A. 5, 1962); *N.L.R.B. v. American Casting Service Inc.*, 365 F.2d 168, 171-172 (C.A. 7, 1966). Thus, the Company urged before the Board that Stevenson was discharged for improper conduct toward supervisors, in that he used obscenities in the course of his meeting with Kottler and Casper on March 21, and also accused Casper of being a liar.[7] That this was not the true reason for Stevenson's termination is demonstrated, as the Board noted (A. 335), by the fact that Kottler, in the conversation with Eudailey minutes earlier, presaged the discharge of Stevenson at a time before the occurrence of the improprieties which are now assigned by the Company as the reason for Stevenson's termination.

The pretextual nature of the discharge is further demonstrated by the fact that Kottler went to Bailey's Crossroads store on March 21 bent on terminating Stevenson because of his refusal to make good a dishonored

---

[7] It is of course settled that "the mere existence of valid grounds for discharge is no defense to a charge that the discharge was unlawful unless the discharge was predicated solely on those grounds and not by a desire to discourage union activity." *N.L.R.B. v. Symons Mfg. Co.*, 328 F.2d 835, 836 (C.A. 7, 1964); *N.L.R.B. v. Whitin Machine Works*, 204 F.2d 883, 885 (C.A. 1, 1953). Moreover, a Board finding that the discharge of an employee was motivated at least in part by his Union activity is sufficient to warrant affirmance of a finding of a Section 8(a)(3) violation. *E.g., Winchester Spinning Corp. v. N.L.R.B.*, 402 F.2d 299, 304 (C.A. 4, 1968); *N.L.R.B. v. Adam Loos Boiler Works Co.*, 435 F.2d 707 (C.A. 6, 1970).

check. This conclusion follows from Kottler's announcement to Eudailey that Stevenson would be fired that day, and by the fact that Kottler, who was fully aware of Stevenson's prior refusal to make good the check, opened his meeting with Stevenson by presenting him with the alternative of making good the check or of incurring the penalty of discharge (*supra*, p. 6). The fact that the Company was prepared drastically to depart from its own practice by requiring this salesman to make good a dishonored check while no other salesman had been required to do so (A. 319, 323; 73, 222-223, 254), is additional proof that the Company's true motive in terminating Stevenson was his Union activity. Cf. *N.L.R.B. v. Heck's Inc.*, 386 F.2d 317, 320 (C.A. 4, 1957); *Aeronca Mfg. Co. v. N.L.R.B.*, 385 F.2d 724, 728 (C.A. 9, 1967); *N.L.R.B. v. Lexington Chair Co.*, 361 F.2d 283, 291 (C.A. 4, 1966). Stevenson's use of profanity during his meeting with Kottler and Casper presented the Company with what at first blush appeared to be a more plausible ground for Stevenson's termination, for such an explanation would obviate the necessity for Kottler to rely on Stevenson's refusal to make good the check, a requirement which would have been an unprecedented departure from the Company's established practice. But at the hearing, while Kottler gave as the reason for Stevenson's termination the same reason urged by the Company before the Board (*i.e.*, his behavior at the meeting and not his refusal to pay for the dishonored check (A. 336; 249, 250)), Casper, who was present at the discharge, attributed it to Stevenson's failure to listen to the terms Kottler proposed to Stevenson for reimbursement of the Company for the dishonored check (A. 326; 227). Such shifting explanations for Stevenson's termination not only serve to discredit the explanation proffered by the Company but also further support the conclusion that neither reason constituted the cause for the Company's action and that, instead, the Company's true

motive for the discharge was Stevenson's support for the Union. See, *N.L.R.B. v. Georgia Rug Mill,* 308 F.2d 89, 91 (C.A. 5, 1962); *N.L.R.B. v. Radcliffe,* 211 F.2d 309, 314 (C.A. 9, 1952), cert. denied, 348 U.S. 833.

III. THE BOARD PROPERLY DECLINED TO GRANT THE ADDITIONAL REMEDIAL RELIEF SOUGHT BY THE UNION

It is settled law that the task of devising remedies to effectuate the policies of the Act has been entrusted by Congress to the Board, and the Board's power to fulfill this duty is a broad discretionary one. *N.L.R.B. v. Gissel Packing Co.,* 395 U.S. 575, 610 n. 32 (1969). *N.L.R.B. v. Seven-Up Bottling Co.,* 344 U.S. 344, 349 (1953); *Fibreboard Paper Prod. Corp. v. N.L.R.B.,* 379 U.S. 203, 216 (1964); *United Steelworkers v. N.L.R.B. (Roanoke Iron),* 129 U.S. App. D.C. 80, 87, 390 F.2d 846, 863 (1967), cert. denied, 391 U.S. 904. Thus, as this Court has held, the Board's choice of remedies will not be disturbed in the absence of a clear abuse of discretion. *United Steelworkers v. N.L.R.B. (Northwest Engineering),* 126 U.S. App. D.C. 215, 276 F.2d 770, 773 (1967), cert. denied, 388 U.S. 932; *International Union of Electrical Workers v. N.L.R.B. (SNC Mfg. Co.),* ____ U.S. App. D.C. ____, 434 F2d 473, 478 (1970).

In the instant case, the Union contends that the Board acted arbitrarily in refusing to issue an order which would have required the Company to post copies of a notice for six months, to mail to each of its employees a copy of the notice, and to make its premises available to the Union for organizational purposes. The Board's order herein, in addition to directing the Company to cease and desist from the unfair labor practices found, contains a "broad" cease and desist order ("In any other manner. . . ," par. 1(g), A. 341), a requirement that the Company reinstate

and make whole employee Stevenson, and a requirement that it post a notice for sixty days (A. 339-345, 361). As we show below, the Union has not sustained its burden of showing that the Board's order is "clearly inadequate in the light of the findings" (*International Union of Electrical Workers v. N.L.R.B. (SNC Mfg. Co.)*, ____ U.S. App. ____, 434 F.2d 473, 478 (1970)). Accordingly, the Union's request for broader relief was properly rejected.

As the Union points out, the Trial Examiner characterized the Company's unfair labor practices as "flagrant" (A. 338); but the record reveals no prior history of unfair labor practices by the Company, which maintains a collective bargaining relationship with this same Union at the leased departments which it operates in the GEM stores (*supra*, p. 3). Moreover, the record in this case demonstrates that the Union has experienced no difficulty in bringing its message to the Company's employees. Thus, Stevenson freely circulated literature and Union authorization cards among the employees at the Company's Bailey's Crossroads store on March 18. Additionally, two day later, the Union sent ten organizers into the Company's stores during working hours and freely conducted organizational activities. Furthermore, the unfair labor practices here committed did not create such an imbalance in communication to the employees as to require the Board to impose the type of additional relief here sought by the Union. Hence, in any subsequent Union organizational effort, the Board's order, containing as it does broad cease and desist provisions, will insure that the Company's unrepresented employees will not be denied the opportunity to hear all points of view.

It is true, as the Union points out, that the Board has, on occasion, required the mailing of notices to the employees. But such an order is

customarily reserved for situations where – unlike here – unusual circumstances exist, such as extremely high turnover of employees, which makes it unlikely that the affected workers would see the notice if it were simply posted in the plant (*Vernon Calhoun Packing Co.*, 173 NLRB 753, 767 (1968)), or the Board's determination that the affected employees would not be likely to see the posting at the union hall (*International Union of Operating Engineers, Local 825*, 173 NLRB 955 at note 1 (1968)). Nor is this a case – as in *Decaturville Sportswear, Inc. v. N.L.R.B.*, 406 F.2d 886, 889 (C.A. 6, 1969) – where the company's unfair labor practices were directed toward thwarting the union's attempts to communicate directly with the employees.

Concerning the Union's request that the notice be posted for 180 rather than 60 days, the Board was amply justified in concluding that such an order was not essential to effectuate the purposes and policies of the Act. For the purpose of notice-posting is to inform the employees of the existence of the Board's order and their rights under that order; and it seems apparent that posting for sixty days would afford employees sufficient opportunity to be apprised of their self-organizational rights.[8] Indeed, a regular part-time employee such as David Stevenson, who worked two or three times each week, would under the Board's order be afforded at least sixteen different opportunities to examine those places at the Company's operations "where notices to employees are customarily posted."

---

[8] While there is no direct proof as to the size of the Company work force at any of its sales locations, it can be assumed that the employee complement at any one of its stores would range from around 15 to 20, based on the testimony of employee David Stevenson that he solicited 15 employees at the Company's Bailey's Crossroads Store on March 18 (A. 17). In any event, the very nature of the Company's operations would tend to dispel any notion that the size of its work force at any location was so large that an additional posting period was necessary to permit employees to be informed of their Section 7 rights.

Finally, the record shows that the Board did not act improperly when it denied the Union's request that the Company be ordered to make its premises available to the Union for the purpose of conducting an organizational meeting of the Company's employees. Such a remedy is hardly called for where, as here, the Union in the past has had little or no difficulty in bringing its message to the Company's employees. The Board could conclude, therefore, that considering the existence of alternative methods of communicating with employees and the absence of any aggravated circumstances, such an order – "strong medicine," in the words of the Sixth Circuit (*N.L.R.B. v. H. W. Elson Bottling Co.*, 379 F.2d 223 (C.A. 6, 1967), cited with approval by this Court in *I.U.E. v. N.L.R.B. (Scotts, Inc.)*, 127 U.S. App. D.C. 303, 305 n. 4, 383 F.2d 230, 232, n. 4 (1967), cert. denied, 390 U.S. 904 – was not essential to remedy the violations found.[9]

We submit, in short, that the Union has not sustained its heavy burden of showing that "the traditional relief provided here will be so ineffective to enforce the policies of the Act as to be insufficient as a matter of law." *Amalgamated Clothing Workers v. N.L.R.B. (Hamburg Shirt Corp.)*, 125 U.S. App. D.C. 275, 281, 371 F.2d 740, 746 (1966).

---

[9] In *I.U.E. v. N.L.R.B. (Scott's Inc.)*, *supra*, this Court without comment approved such relief in a factual setting clearly different from the instant case – the presence of aggravated circumstances, a long history of bad relations with the Union, and extensive violations of Sections 8(a)(1), (2) and (3) of the Act.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court enter judgment denying the Union's petition for review and enforcing the Board's order in full.

EUGENE G. GOSLEE,
Acting General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

WARREN M. DAVISON,
Deputy Assistant General Counsel,

National Labor Relations Board.

July 1971.

Finally, the record shows that the Board did not act improperly when it denied the Union's request that the Company be ordered to make its premises available to the Union for the purpose of conducting an organizational meeting of the Company's employees. Such a remedy is hardly called for where, as here, the Union in the past has had little or no difficulty in bringing its message to the Company's employees. The Board could conclude, therefore, that considering the existence of alternative methods of communicating with employees and the absence of any aggravated circumstances, such an order – "strong medicine," in the words of the Sixth Circuit (*N.L.R.B. v. H. W. Elson Bottling Co.*, 379 F.2d 223 (C.A. 6, 1967), cited with approval by this Court in *I.U.E. v. N.L.R.B. (Scotts, Inc.)*, 127 U.S. App. D.C. 303, 305 n. 4, 383 F.2d 230, 232, n. 4 (1967), cert. denied, 390 U.S. 904 – was not essential to remedy the violations found.[9]

We submit, in short, that the Union has not sustained its heavy burden of showing that "the traditional relief provided here will be so ineffective to enforce the policies of the Act as to be insufficient as a matter of law." *Amalgamated Clothing Workers v. N.L.R.B. (Hamburg Shirt Corp.)*, 125 U.S. App. D.C. 275, 281, 371 F.2d 740, 746 (1966).

---

[9] In *I.U.E. v. N.L.R.B. (Scott's Inc.)*, *supra*, this Court without comment approved such relief in a factual setting clearly different from the instant case – the presence of aggravated circumstances, a long history of bad relations with the Union, and extensive violations of Sections 8(a)(1), (2) and (3) of the Act.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court enter judgment denying the Union's petition for review and enforcing the Board's order in full.

EUGENE G. GOSLEE,
Acting General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

WARREN M. DAVISON,
Deputy Assistant General Counsel,

National Labor Relations Board.

July 1971.